No. 13037

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROGUE VALLEY BROADCASTING CO., INC. (KWIN), RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FREDERICK U. REEL,
THOMAS F. MAHER,
Attorneys,
National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases—Continued

Statutes: Page

In the United States Court of Appeals for the Ninth Circuit

No. 13037

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROGUE VALLEY BROADCASTING CO., INC. (KWIN), RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for the enforcement of its order issued against respondent on March 27, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*).[1] The Board's Decision and Order (R. 48–54) are reported in 93 N. L. R. B. No. 164. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices in question having occurred at Ashland, Oregon, within this judicial circuit.

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 29–33.

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law[2]

Following the usual proceedings under the Act, the Board found that respondent is engaged in commerce within the meaning of the Act, that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, and that respondent discriminatorily discharged Ralph Click in violation of Section 8 (a) (3) of the Act. In so finding the Board rejected respondent's contention that Click was a supervisory employee outside the protection of the Act. The subsidiary facts upon which these findings rest may be summarized as follows:

A. The interstate character of respondent's operations

Rogue Valley Broadcasting Co., Inc., is an Oregon corporation with its principal office and place of business at Ashland, Oregon, where it operates Radio Station KWIN under license by the Federal Communications Commission, hereinafter referred to as the F. C. C. (R. 11–12; 100–102, 198).[3] The station is located approximately 15 air-miles from the California State line and broadcasts radio signals in interstate commerce, making its required monthly frequency check with the Radio Corporation of America station at Point Reyes, California, and utilizing

[2] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with several modifications noted in its decision (R. 49).

[3] Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; subsequent references are to the supporting evidence.

the lines and facilities of the Pacific Telephone and Telegraph Co. (R. 11–12; 63–65, 180–184). The station uses these interstate lines to broadcast two programs originating in Los Angeles, California, regularly scheduled for 30 minutes each day, six days per week, and also local programs originating outside of the station (R. 12; 64). These so-called remote broadcasts represent 3½ percent of all broadcasting time of the station (R. 12; 97, 102).

Respondent's annual purchases total $5,000, of which $2,500 is paid annually to the World Broadcast, Inc. of Los Angeles, California, for the two programs transmitted to respondent's station (R. 12; 95, 101). The remainder is expended for the purchase of equipment for the station (R. 12; 95). Annual advertising revenue ranges between $50,000 and $60,000 (R. 12; 95–97). Over 50 percent of this revenue is derived from the advertising of nationally distributed goods and products, manufactured outside of the State of Oregon (R. 12; 98–100).

Upon the foregoing facts, the Board found that respondent was engaged in commerce within the meaning of the Act (R. 12).

B. The unfair labor practices

1. Background of labor relations

In July 1949 Employees Ralph Click and Charles Fields expressed an interest in organizing the four employees in respondent's Engineering and Announcing Department (R. 17; 155–156). At a meeting with Renoud, a representative of the International Brotherhood of Electrical Workers, hereinafter re-

ferred to as the Union, both employees signed Union membership cards and authorizations to the Union to represent them, and took with them application cards with which to solicit the Union membership of the two other employees in the department (R. 17; 155–156). Thereafter Click enlisted the Union membership of Employee Donald Smith (R. 17; 174).[4] Upon receiving authorization cards from three of the four employees in the Engineering and Announcing Department, the Union notified respondent that it represented a majority of its employees, and that it had filed with the Board its petition for certification as the representative of the employees for the purposes of collective bargaining (R. 17–18; 73–74, 156). The Union likewise advised respondent that any attempt to discharge employees or to intimidate or coerce them would be viewed as an unfair labor practice and would be referred to the Board (*ibid.*).

Thereafter, on August 29, 1949, pursuant to the terms of a consent election agreement, the Board conducted an election among the employees in the Engineering and Announcing Department which the Union won, 3 to 1 (R. 20; 75).[5] On September 7 the Board certified the Union as the exclusive bargaining representative in the unit previously agreed upon as

[4] Employee Philip George, the fourth employee of the department and the one ultimately selected by respondent to replace Click as chief engineer, testified that he did not join the Union (R. 125, 174).

[5] Employees Smith, Click and Fields each voted *for* the Union (R. 138, 144, 176); George, who replaced Click upon his discharge, did not reveal his vote but it is obvious that it was *against* the Union.

appropriate for collective bargaining purposes (R. 20; 76–77).

2. Interrogation and other interference, restraint, and coercion of employees

On the same day that the Union advised respondent of its claim to majority status and of its filing of a certification petition, respondent, through Station Manager Barnett, began a campaign of questioning the employees concerning the Union, and of conveying to them respondent's animosity towards it. Barnett called Click to his office and asked him what he thought about the Union (R. 18, 175–176). When Click replied that he thought it would be good for the employees, Barnett stated that anyone "who was not satisfied here, can quit" (R. 18; 175). He then expressed himself on the subject directly, saying, "we don't want any damn union around here. They leave a very bad taste in my mouth, and it would if you joined the Union behind my back" (R. 18–19; 175). Barnett concluded the interview by remarking that "he wouldn't rest until [the Union] died" (R. 19; 176).

Similarly, 10 days before the election, Barnett inquired of Employee Fields what he "thought about the Union" (R. 19; 144). When Fields stated that he favored it, Barnett told him that "he hoped that [Fields would] keep [his] views with the station and their ideas" (R. 19; 144). At about the same time Barnett also asked Employee Smith what he "thought about the Union" and how he would benefit by being a member (R. 19; 134, 141). Shortly thereafter Barnett sought out Smith and had a second conversation

with him about the Union. This time, in an attempt to dissuade Smith from his Union preference, Barnett showed him a letter from respondent's counsel which stated, in effect, that if the employees joined the Union they would be turning their bargaining powers over "to the Portland Local," would have no voice in the Union at all, and would be subject to regulations of outsiders (R. 19; 135). During the conversation Barnett also identified Employee Click as a moving force in the Union and hinted that Click would soon be discharged. Thus, in soliciting Smith's vote at the coming election, Barnett assured Smith that if he voted against the Union he "wouldn't have anything to fear from Mr. Click because he wouldn't be there" (R. 19; 135, 140–141). At about the same time Barnett also questioned Employee George as to his Union preferences (R. 19–20; 124).

The Board concluded that by such interrogation of the employees concerning their union preferences and by accompanying statements calculated to intimidate the employees and influence their vote in the pending election respondent, through Station Manager Barnett, interfered with, restrained, and coerced its employees and thus violated Section 8 (a) (1) of the Act (R. 20–21).

3. The discriminatory discharge of Ralph Click

a. Click's alleged supervisory status

Respondent employed nine employees, exclusive of its station manager, Edward P. Barnett (R. 13; 65–68). Five employees were assigned to the commercial and program phases of the station's opera-

tions (R. 13; 67). The remaining four comprised the station's engineering and announcing department, and included Employees Fields, George, Smith, and Click, all licensed radio engineers (R. 13; 66–67). Click was hired in February 1949 by the then Station Manager Reinholdt, as an engineer and announcer (R. 163–164). In August 1947 he was designated Chief Engineer, a position he retained when Barnett succeeded Reinholdt in September 1948 (R. 21; 65, 68, 165). Click's primary duty, as prescribed by F. C. C. regulations, was the responsibility for maintenance and operation of the station's technical equipment (R. 14, 16; 69). In this respect he instructed other employees in the use of the equipment, directed necessary repairs, and, when necessary, engaged in the maintenance work himself (R. 14; 69–70, 94, 183–184). Like the other three employees in the department he was assigned to a regular shift as announcer and engineer operator (R. 14; 112–113). The work schedules upon which such assignments were based were prepared by Click but required the approval of Station Manager Barnett before they became operative (R. 92, 184), and according to Barnett, "as far as the announcers' set-ups were concerned * * * [Click's] status was the same as the rest" (R. 14; 113). Click had no authority to authorize employees to work overtime except with Barnett's prior permission (R. 14; 184). In fact, Click's authority extended only to responsibility for the maintenance and operation of the equipment, and the making of minor routine purchases connected there-

with (R. 14; 68). Major purchases required Barnett's approval (R. 44; 68).

Click had no authority to grant wage increases (R. 14; 92, Tr. 39). His salary was identical with that of Employee Fields, a fellow member of the Engineering and Announcing Department, and was $30 to $50 per month more than the salaries of the two junior members of the staff (R. 14–15; 94). Click, however, had no knowledge of the salaries of the other men (R. 14–15; 185).

Barnett interviewed all new applicants for employment (R. 186), and had informed Click that "he [Barnett] would do all the hiring and firing at the station" (R. 15–16; 167). Employee George testified that he was originally interviewed by Reinholdt, Barnett's predecessor, and not Click (R. 128), thus corroborating Barnett's assertion that Click "was never given the right to hire * * * outright" (R. 15; 90–91). Nor could Click effectively *recommend* the hiring of new employees. Illustrative of the absence of such power was Barnett's refusal to follow Click's recommendations that an applicant named Wyatt be hired as an operator, and that Liebman, presently employed as an announcer at the station, not be hired (R. 15; 184–185). Similarly, Click possessed no authority to discharge or to effectively recommend discharges. Thus Barnett testified that in his absence the Commercial Manager of the Station, Bardeen, is in charge of the station, and that Click had been so informed (R. 15–16; 89–90). Click, who did have power to discharge under Barnett's

predecessor (R. 167), testified without contradiction that when he attempted to exercise it under Barnett by way of recommending the discharge of one Beckett, Barnett informed him that "he would do all the hiring and firing" and declined to follow Click's recommendation (R. 15–16; 167).[6]

During the course of the Board's representation proceedings respondent took the position that Click was not a supervisory employee. At a conference, held on August 29, 1949, between Barnett, representing respondent, a field examiner of the Board, and a representative of the Union, the Board's field examiner asked Barnett what respondent's position was regarding Click's status (R. 16; 158). Barnett replied that "Click's position, as Chief Engineer, in compliance with Federal Communications Commission regulations was to see that the equipment was maintained" and "he had no power to do anything else as laid out by the Act as a supervisory employee" (R. 16; 158–159). He agreed that Click should vote in the election, and at the election thereafter held

[6] In certain respects the testimony of Barnett and Click was directly conflicting. Thus Barnett denied that the authority possessed at one time by Click (R. 91–92, 167) to discharge under emergency circumstances had ever been revoked (R. 91–92, 199–200), and also testified that Click had the authority to recommend hiring (R. 90). Insofar as the testimony was in conflict the Trial Examiner "upon the entire record and his observation of the witnesses" credited that of Click and found "Barnett's testimony unworthy of credence" (R. 16). "For obvious reasons, questions of credibility were for the trial examiner" *N. L. R. B.* v. *State Center Warehouse and Cold Storage Co.*, C. A. 9, No. 12,815, decided November 27, 1951. Cf. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 496.

respondent did not challenge Click's ballot (R. 16; 159).

Upon the foregoing facts the Board concluded that Click did not possess supervisory status within the meaning of the Act (R. 16, 49).

b. The circumstances surrounding Click's discharge

Click was one of the two employees responsible for the organization of respondent's employees and for the advent of the Union at the station. In company with Employee Fields he first met with the Union's representative, and thereafter secured the Union membership of Employee Smith (R. 17; 155–156). He also solicited Employee George's membership without success (R. 125). Click's Union interest and activities were admittedly known to respondent's station manager, Barnett, who, as noted above, manifested deep hostility to the Union and, while attempting to influence Employee Smith's vote in the election, predicted Click's discharge (*supra,* p. 6).

On September 2, 1949, four days following the Union's success in the election, Barnett summoned Click to his office and without prior warning summarily dismissed him from respondent's employ, giving him twenty minutes within which to get out of the station (R. 22–23; 19, 110, 177–178, 207–208). Barnett told Click that he was discharged because he was inefficient, dishonest, uncooperative incompetent, unqualified, caused trouble and dissension among the employees, had talked to members of the Board of Directors behind Barnett's back, and had sought employment elsewhere (R. 22; 177, 202).

Immediately upon dismissing Click, Barnett went in to the control room, snatched Click's F. C. C. license from the wall, took it to his office and in his haste to remove the license from its frame cut away the padding with his pocket knife (R. 23; 177–178). He then indorsed the license "unsatisfactory" on the space provided for the radio station's indorsement of a license holder's services (R. 23; 177–178). Such an indorsement, Barnett conceded, would seriously handicap an engineer's future employment (R. 23; 78, 208). In Click's case he found it impossible to secure work as an engineer and eventually obtained a job as a truck driver (R. 162).

The Board, observing that Click was discharged without warning and that the reasons given him were couched in the most general terms, also noted respondent's knowledge of Click's union activity, its manifest antiunion bias, and Barnett's remark to Smith, when soliciting his vote against the Union, that he "wouldn't have anything to fear from Mr. Click because he wouldn't be there" (R. 38–39). Recalling that Barnett had also attributed Click's discharge to the fact that he was a troublemaker and a creator of dissension among the employees, the Board inferred that this characterization of Click was based upon the latter's union membership and activity, and constituted the true reason for his discharge (R. 38).[7]

[7] The Board carefully considered the various grounds advanced by respondent to justify Click's discharge. It found none of them was the true reason. To avoid needless repetition we discuss these alleged grounds in the Argument, *infra*, pp. 19–27.

II. The Board's order

Upon the foregoing findings of fact and conclusions of law the Board ordered respondent to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by the Act (R. 49–50). Affirmatively, the Board ordered respondent to offer reinstatement with back pay to Employee Ralph Click, and to post the appropriate notices of compliance with the Board's order (R. 50–52).

ARGUMENT

Point I

Respondent is engaged in commerce within the meaning of the Act

The undisputed facts relevant to the question of the Board's jurisdiction clearly demonstrate that respondent radio station is engaged in commerce, and that the unlawful conduct found affects commerce, within the meaning of the Act.

Respondent utilizes the facilities of the Pacific Telephone and Telegraph Co., admittedly engaged in commerce,[8] broadcasts signals capable of reception by an audience located beyond the California-Oregon state line, 15 miles distant from respondent's station, makes a periodic frequency check with a station located in neighboring California, and regularly broadcasts programs originating in Southern California and transmitted to respondent's station over the

[8] *The Pacific Telephone and Telegraph Co.*, 55 N. L. R. B. 1361, 1362.

aforementioned interstate telephone facilities. Furthermore respondent derives over half its income from advertising goods manufactured outside the State of Oregon, and thus furthers the interstate shipment of such goods. And finally respondent's station operates under a license of and subject to the regulations of the Federal Communications Commission, a federal agency charged with the regulation of interstate "transmission of energy or communication or signals by radio."[9]

Upon these facts the Board's jurisdiction is firmly established under long recognized principles.[10] And indeed, independent of these facts, "it is clear," as this Court has stated (*N. L. R. B.* v. *Pacific Gas and Electric Co.,* 118 F. 2d 780, 786), "that a radio station is an instrumentality of interstate commerce."

Nor is it significant to a final determination of the Board's jurisdiction that a greater or lesser volume of respondent's business and activities is either "in commerce" or "affects" it. For, as this Court has but recently stated (*N. L. R. B.* v. *M. L. Townsend,* 185 F. (2d) 378, 382, certiorari denied, 341 U. S. 909) "unless the volume of commerce that may be

[9] Communications Act of 1934, 48 Stat. 1064, as amended 50 Stat. 189; 47 U. S. C. 153 (e), 301.

[10] *N. L. R. B.* v. *Jones and Laughlin Corp.*, 301 U. S. 1, 31; *Santa Cruz Co.* v. *N. L. R. B.*, 303 U. S. 453, 464; *N. L. R. B.* v. *Virginia Electric Power Co.*, 314 U. S. 469, 476; *Mandeville Island Farms, Inc. et al.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229, 234, 236; *N. L. R. B.* v. *Weyerhauser Timber Co.*, 132 F. (2d) 234 (C. A. 9); *N. L. R. B.* v. *West Texas Utilities Co.*, 119 F. (2d) 683, 684 (C. A. 5).

affected is so slight as to bring into play the maxim *de minimis,* the applicability of the Act is not dependent upon the amount of commerce affected." Similarly, as the Court of Appeals for the Tenth Circuit has recently emphasized, "the Board is specifically empowered to prevent any proscribed unfair labor practice 'affecting commerce,' and whether any such unfair labor practices affect commerce is not to be determined solely by the quantitative effects of the activities immediately before us." *N. L. R. B.* v. *Tri-State Casualty Insurance Co.,* 188 F. (2d) 50, 52. See also *N. L. R. B.* v. *Denver Building and Construction Trades Council,* 341 U. S. 675; *N. L. R. B.* v. *Fainblatt,* 306 U. S. 601; *N. L. R. B.* v. *Mid-Co Gasoline Co.,* 183 F. (2d) 451 (C. A. 5).

Point II

Substantial evidence supports the Board's findings that respondent in violation of Section 8 (a) (1) questioned employees concerning their Union preferences and attempted to coerce them in the exercise of their right of self-organization guaranteed them by the Act

The evidence detailed in the Statement of Facts—consisting in the main of admitted or undisputed testimony—fully supports the Board's findings that station manager Barnett questioned the employees about their Union interests and membership, observed that "we don't want any damn union around here" because "they leave a very bad taste in my mouth," and threatened that "he wouldn't rest until [the Union] died," and that anyone who was dissatisfied could quit (*supra,* pp. 5–6).

There is no doubt that such conduct constitutes an unfair labor practice within the meaning of Section 8 (a) (1) of the Act. Such "interrogation * * * carries with it at least the aroma of coercion" (*Joy Silk Mills* v. *N. L. R. B.* 185 F. (2d) 732, 740 (C. A. D. C.), certiorari denied, 341 U. S. 914) and has been "uniformly condemned as violation of the Act" (*N. L. R. B.* v. *Norfolk-Southern Bus Co.,* 159 F. 2d 516, 518 (C. A. 4), certiorari denied, 330 U. S. 844). See also *N. L. R. B.* v. *Bradford Dyeing Association,* 310 U. S. 318, 327; *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 518; *N. L. R. B.* v. *J. G. Boswell Co,* 136 F. (2d) 585, 590 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.,* 140 F. (2d) 243, 245 (C. A. 9); *N. L. R. B.* v. *Ford,* 170 F. (2d) 735, 738 (C. A. 6); *N. L. R. B.* v. *M. A. Hanna Co.,* 125 F. (2d) 786, 788 (C. A. 6); *N. L. R. B.* v. *Minnesota Mining and Manufacturing Co.,* 179 F. (2d) 323, 326 (C. A. 8).

The rationale underlying the determination that the interrogation of employees constitutes an unlawful intrusion upon the freedom of self-organization was fully considered by the Board in *Standard-Coosa-Thatcher,* 85 N. L. R. B. 1358, at 1361. The Board observed in that case that interrogation "invades the employee's privacy and thus constitutes interference with his enjoyment of rights guaranteed to him by the Act." Its necessary effect "is to 'restrain' or to 'coerce' the employee in the exercise of those rights" by arousing in him the natural fear that the employer seeks the information in order to use it to the employee's detriment. Consequently, the Board

concluded, the employee is "in effect warned that any contemplated union activity must be abandoned, or he will risk loss of his job." The instant case illustrates the validity of the Board's reasoning; Barnett's statement that he wouldn't rest until the union died demonstrates the deliberateness of his purpose to defeat what he learned to be the employees' preferences.

Similarly it is well established that threats such as Barnett's remarks to Click that those who were dissatisfied could quit, and that he wouldn't rest until the Union died, were clearly calculated to coerce and restrain the employees in the exercise of their statutory rights.[11] Statements of such a nature have been consistently held to violate Section 8 (1), now Section 8 (a) (1), of the Act. *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1006–1008 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. (2d) 243, 245 (C. A. 9); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. A. 9), certiorari denied, 312 U. S. 678; *Peoples Motor Express* v. *N. L. R. B.*, 165 F. (2d) 903 (C. A. 4); cf. *N. L. R. B.* v. *Reeves Ruber Co.* 153 F. (2d) 340, 341 (C. A. 9).

[11] The free speech provisions of Section 8 (c) of the amended Act grant no privilege or immunity to statements found to have been coercive. As this Court early stated (*N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. 2d 1004, 1008), "the right of free speech cannot be invoked to coerce employees." For similar holdings under the amended Act see *N. L. R. B.* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *N. L. R. B.* v. *Minnesota Mining & Mfg. Co.*, 179 F. (2d) 323, 326 (C. A. 8); *N. L. R. B.* v. *Kropp Forge Co.*, 178 F. (2d) 822, 827–828 (C. A. 7), certiorari denied, 340 U. S. 810; *N. L. R. B.* v. *La Salle Steel Co.*, 178 F. (2d) 829, 832 (C. A. 7), certiorari denied, 339 U. S. 963.

Point III

Substantial evidence supports the Board's finding that respondent discriminatorily discharged Ralph Click in violation of the Act

A. Substantial evidence supports the Board's findings that Click was not a supervisory employee

Respondent sought to avoid liability for the discharge of Click by contending that he was a supervisory employee and hence under Sections 2 (3) and (11) was outside the protection of the Act.[12]

The Board's findings with respect to Click's duties establish beyond question, however, that his role as chief engineer carried with it responsibility for the station's technical equipment (R. 68, 112–113), as distinct from responsibility for its normal operation by other qualified licensed engineers, and that Click was neither directly nor indirectly the responsible supervisor of his fellow employees. Thus, by Barnett's admission, Click's "status was the same as the rest" in the assignment of working schedules (R. 113), and he prepared work schedules only under Barnett's direction. His salary was no greater than that of Fields, who respondent admits is not a supervisory employee. Click had no authority to grant salary increases or to authorize overtime, and was not

[12] Section 2 (11) of the Act provides that the term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

even informed of the salaries of employees allegedly under his supervision. He was specifically told that he had no authority to hire and fire (R. 167), and his recommendations for hiring and firing, when offered to Barnett, were rejected. And finally respondent itself conceded prior to the representation election that Click's position was "to see that the equipment was maintained" and that "he had no power to do anything else as laid out by the Act as a supervisory employee" (R. 159). Respondent affirmed this position by failing to challenge Click's ballot in the Board election.

Respondent argued that Click had at one time under a previous manager discharged an unruly employee, and his right to do so had never been specifically rescinded. It is clear, however, that such authority to discharge as Click may have possessed had been, in fact, rescinded by the present station manager, Barnett, when refusing to permit Click's discharge of an unsatisfactory employee, Beckett (*supra,* p. 9), or to accept Click's recommendation, Barnett told him "he [Barnett] would do all the hiring and firing" (R. 167).

The fact that Click had responsibility for the maintenance and operation of equipment in no way cloaks him with the status of a "supervisor" under the Act. The statutory language, quoted *supra*, n. 12, leaves no room for doubt that to qualify as a supervisor under the Act, one must supervise employees, not machines. Fully applicable here is the observation of the First Circuit with respect to a claim that cer-

tain "time study men" were supervisory employees (*N. L. R. B. v. Brown and Sharpe Mfg. Co.*, 169 F. (2d) 331, 334):

> Thus it is not of consequence that Respondent's time study men have been found to possess authority to use their independent judgment with respect to some aspects of their work; the decisive question is whether they have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities listed in Sec. 2 (11) of the Act as amended.

The evidence leaves no room for doubt that respondent neither relied upon nor invited Click's independent judgment upon any matter beyond his responsibility for the maintenance and operation of equipment. The Board's finding that Click was not a supervisory employee, and was therefore within the protection of the Act has ample support in the evidence.

B. Substantial evidence supports the Board's finding that respondent discharged Click for union membership

The evidence summarized at pages 10–11, *supra,* is clearly sufficient to support the Board's finding that respondent discriminatorily discharged Click for union activities, thereby violating Section 8 (a) (3) and (1) of the Act. The record establishes that respondent was aware of Click's union activities to which respondent was bitterly hostile, that Click was discharged shortly after the election at a time when Barnett admittedly had no fault to find with his

performance for the past six weeks (R. 118), that Barnett was nevertheless apparently very angry at Click, giving him 20 minutes to leave the premises and ripping his license from its frame, that Barnett had given Click no warning of his impending discharge, and that the "reasons" which Barnett vouchsafed to Click at the time consisted of vague generalities, more illuminative of Barnett's state of mind than of Click's alleged transgressions. While these circumstances in themselves constitute evidence from which the Board might reasonably draw an inference of discriminatory treatment,[13] here, as in *N. L. R. B.* v. *Bird Machine Co.*, 161 F. (2d) 589, 592 (C. A. 1), "the weight to be accorded the inferences drawn by the Board is augmented by the fact that the explanation of the discharge offered by respondent did not stand up under scrutiny."

(1) Initial reasons advanced for the discharge

Respondent's first attempt to explain its reasons for discharging Click was made in response to an inquiry from the Union a few days after the discharge.

[13] As to hostility to union, see *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588; *N. L. R. B.* v. *Morris P. Kirk & Sons, Inc.*, 151 F. (2d) 490, 492–493 (C. A. 9).

As to precipitate manner of discharge, see *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 327, 329; *N. L. R. B.* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. A. 9), certiorari denied, 306 U. S. 643; *E. Anthony & Sons* v. *N. L. R. B.*, 163 F. (2d) 22, 26–27 (C. A. D. C.), certiorari denied, 332 U. S. 775.

As to failure to give employee reason for discharge, see *N. L. R. B.* v. *Wells, Inc.*, 162 F. (2d) 457, 459 (C. A. 9); *N. L. R. B.* v. *American Potash & Chemical Corp.*, *supra.*

Barnett repeated the vague statement already made to Click that he "created dissension among the men" and added that he "had not maintained the equipment properly" (R. 23; 159). These grounds were not pressed thereafter, and it is significant that at that time respondent made no mention of the allegedly more serious offenses it later urged.

(2) Reasons given the F. C. C. to explain the discharge

Thereafter in response to an inquiry from the F. C. C. as to why Click's license had been endorsed "unsatisfactory," respondent adverted to two incidents: an alleged failure properly to maintain a wire recorder for announcer Clark, who had repeatedly broken wire cartridges on this machine, and an allegedly poor reception of a rodeo broadcast. Since respondent later urged that it had decided to discharge Click *before* the rodeo episode, the Board properly found that that incident was not a significant factor in the discharge. Moreover, it appeared that Barnett had never discussed the matter with Click or with the announcers involved, and that other employees had no criticism to make of the broadcast and had heard none from Barnett (R. 33–34; 88, 125, 147). Under these circumstances the Board properly held that Barnett's reliance on the rodeo episode was but a pretext intended to conceal his real motivation for discharging Click.

The other reason reported to the F. C. C., Click's alleged mishandling of the wire recorder in May and June 1949, was likewise properly rejected by the Board as mere pretext for Click's discharge in

September. If, as Barnett claimed, the alleged improper maintenance of the wire recorder was of such significance that it should be reported to the F. C. C., it is reasonable to expect that he would have considered it so at the time it happened. Barnett admitted, however, that he never made any investigation of the matter; and Click testified without dispute that Barnett made no mention of the incident beyond mentioning that the repair cost "was getting to be exorbitant" (R. 27, 31; 87–88, 170). Thus, assuming respondent's factual account of the wire recorder incident to be accurate, it is difficult to understand why an incident that was so trivial when it occurred, suddenly became so important when Click had been discharged. Moreover, the testimony of Click and three other employees credited by the Board established that Clark, the announcer using the recording machine, mishandled it in such a manner as to break an excessive number of wire cartridges, and otherwise failed to follow out the instructions given him in detail by Click (R. 31; 136–137, 146, 152–154, 170–171). In view of this patent example of improper operation of equipment and of Barnett's admitted failure to investigate the difficulty himself, Barnett's accusation of Click addressed to the F. C. C. was obviously unfounded.

(3) Reasons eventually advanced at the hearing to explain the discharge

The discharge reasons advanced by respondent at the hearing a year later, while they clearly show that the initial reasons, considered above, did not accurately portray respondent's motivation, are even

less persuasive.[14] Thus, for the first time respondent contended that Click's objection to Clark's after-hours use of the station and its equipment, was *the* determinant cause for Click's discharge. Barnett testified that he intended to fire Click the Monday after he heard of this episode, but that Click's sudden illness caused Barnett to postpone the discharge "until the man was out of the hospital and back on his feet"; "to wait approximately 30 days" (R. 108). But the rodeo incident complained of to the FCC occurred within the next thirty days. If Click were well enough to do this rodeo broadcast, he would seem to be sufficiently "back on his feet" to be discharged, as planned. This inconsistent position, coupled with respondent's previous failure to mention the "after hours" incident, makes it clear that Barnett's determination to discharge Click in June or July 1949 was by no means as strong *then* as his year-old account of it at the hearing would make it appear.

A full consideration of the incident itself warrants the conclusion that respondent's interpretation was unreasonable. In June 1949 Sellens, the station's night watchman, and Engineer George reported to Click (R. 32, 181) that Announcer Clark had been in the station after the 11:00 p. m. closing hour, had attempted to turn on some of the equipment, and had been asked by Sellens to leave (R. 32; 131).

[14] Prior to the hearing, in a letter addressed to a field examiner of the Board following the filing of the charge in this case, Barnett stated simply that "Click was released for incompetency and willful neglect of duty" (R. 25; 83–84).

Clark's action was contrary to a rule of the station forbidding its use after hours to anyone except Click, and, according to Click's credited testimony, the attempted use of equipment was contrary to F. C. C. regulations (R. 32; 181–182).[15] On the night of June 22 Click found Clark in the station after the closing hour and asked him to leave (R. 32–33; 106–107, 192–193). On the following day Barnett, having learned of the incident, inquired of Click why Clark was expelled from the station (R. 28, 33; 106–108, 181). Click reminded Barnett of the station rule which he had not understood to have been rescinded (R. 33; 106–108, 181). Barnett denied to Click the existence of any such rule[16] and instructed Click to permit Clark's access to the station at all times (R. 33; 107). At this point Click directed Barnett's attention to Click's responsibility for the station's equipment imposed upon him by F. C. C. regulations (R. 33; 181, 194–195; Tr. 148) and stated that he would "never be responsible for the technical equipment of this station as long as that policy [of permitting persons

[15] Rules and Regulations, Federal Communications Commission; 47 Code of Federal Regulations; 3 F. R. 3155; 14 F. R. 1600:

"Sec. 13.63 *Operator's responsibility.* The licensed operator responsible for the maintenance of a transmitter may permit other persons to adjust a transmitter in his presence for the purpose of carrying out tests or making adjustments requiring specialized knowledge or skill, provided that he shall not be relieved thereby from responsibility for the proper operation of the equipment.

* * * * *

"Sec. 13.65 *Damage to apparatus.* No licensed radio operator shall wilfully damage or cause or permit to be damaged, any radio apparatus or installation in any licensed radio station."

[16] Both Sellens and Click testified to the existence of such a rule. The Board in crediting this testimony, rejected Barnett's denial that the rule existed (R. 33).

in the station after hours] lasts" (R. 28; 187, 194). To equate Click's observance of responsibilities with a willful neglect of duty, as respondent would do, is contrary to all reason and understanding. The Board properly concluded, therefore, that Click was acting in advocacy of an existing rule and was seeking to absolve himself of FCC-imposed responsibility for any damage to the equipment that Barnett's new arrangement might cause, and that such action was unquestionably not a justifiable reason for a discharge two or more months thereafter.

Barnett further urged at the hearing, as a reason for Click's discharge, Click's use of company-supplied gasoline for personal and unauthorized purposes. That Barnett had never relied upon this incident until pressed for justification for the discharge is clear from his own testimony that after speaking to Click about the incident in June 1949, he "dismissed [Click] from the office at that time and let it go at that because, while actually I should have discharged him on the spot * * * I still thought * * * I'll think it over and see what kind of action I should take" (R. 27; 105–106). Click, admitting that he used the gasoline to compensate for previous business-incurred gasoline expense, testified that he considered the matter "dropped," thus verifying Barnett's intent "to let it go at that" (R. 27; 173). Respondent thus resurrected at the hearing a long-forgotten, and forgiven, misunderstanding to justify a discharge occurring months after the misunderstanding itself occurred.

Upon considering the shifting and inconsistent character of respondent's reasons for Click's discharge, together with their apparent lack of any real merit, the Board properly found that the reasons advanced were mere pretexts intended to conceal respondent's discriminatory motivation.[17]

Respondent's more general accusations against Click were likewise more distinguished by their shifting character than by their substance. Thus Click was told that he was "inefficient, uncooperative, incompetent, unqualified, and dishonest," and that he "was a trouble maker and caused dissension among the employees." He was not told, as was the Union and the FCC, that he had not maintained the equipment; nor was he told, as was the Board agent, that he was discharged for "willful neglect of duty." Nor were either the Union or the Board agent told of the general "faults" attributed to Click at the time of his discharge. Accordingly, the Board's evaluation of these reasons as "shifting" is equally as applicable here as it was to the specific incidents considered above. And the courts have long recognized that inconsistency in explaining the reason for a discharge is a factor on which to base an inference that the true reason for the discharge is being concealed. *N. L. R. B.* v. *Waterman Steamship Co.,* 309 U. S.

[17] The long interval between the occurrences assigned by Barnett as his reasons for Click's discharge and the date of his discharge (R. 39) strongly suggests that "the difficulties in his case only became seriously insupportable to his employer when he became [active] in the Union." *Agwilines, Inc.* v. *N. L. R. B.*, 87 F. (2d) 146, 154 (C. A. 5).

206, 221, 223; *N. L. R. B.* v. *Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 378 (C. A. 2).

The circumstances of Click's discharge and the palpably specious nature of the explanations offered by respondent thus furnish ample basis for the conclusion that the discharge was discriminatory. Click, a qualified technician, doing an admitted satisfactory job for the six weeks preceding his discharge (R. 118), was summarily dismissed for reasons given in only general terms and was given twenty minutes to leave the station, with a license hurriedly endorsed "unsatisfactory," for reasons that, when later divulged, were found to be shifting and contrary to fact. Following Click's discharge, George, who had less experience and seniority than the other engineers, but who was the only one who had not joined the Union and had voted against it in the Board election, was assigned the job of chief engineer, as Click's replacement. Such circumstances, particularly when linked with respondent's conceded knowledge of Click's prominence in the Union, its admitted questioning of Click and others respecting the Union, and its accompanying threats made from the very advent of the Union, fully support the Board's conclusion that Click's discharge immediately after the Union's successful campaign constitutes discrimination because of his union membership and activity in violation of Section 8 (a) (3) of the Act.

CONCLUSION

It is respectfully submitted that the Act is applicable to respondent, that the Board's findings are

supported by substantial evidence considered on the record as a whole, that its order is valid and proper, and that a decree should be entered enforcing said order in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FREDERICK U. REEL,
THOMAS F. MAHER,
Attorneys,
National Labor Relations Board.

JANUARY 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended[1] (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in con-

[1] The Act was further amended, in a manner not material here, by Public Law 189, 82d Cong., 1st Sess., enacted Oct. 22, 1951.

nection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or

the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1952